



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 23, 1998

Mr. Eric M. Bost
Commissioner
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR98-0243

Dear Mr. Bost:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 111969.

The Texas Department of Human Services (the "department") received a request for information concerning the Texas Lone Star Image System (the "LSIS"). The department provided most of the information requested, but, pursuant to section 552.305 of the Government Code, asked this office to determine whether some of the requested information is confidential. You state that North American MORPHO Systems, Inc. ("MORPHO"), has asserted that some of the information at issue is confidential. As provided by section 552.305 of the Open Records Act, this office notified MORPHO of the request for information and provided an opportunity for MORPHO to submit reasons as to why the requested information should be withheld from disclosure.

MORPHO's attorney notified this office that MORPHO has no objection to release of most of the information at issue. However, the attorney supplied this office with five pages that are marked to show certain sentences that MORPHO contends are confidential under section 552.110 of the Government Code. Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. MORPHO's attorney argues that the marked information is excepted from disclosure as confidential commercial information.

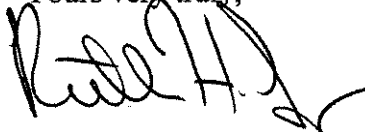
Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom

of Information Act when applying the second prong of section 552.110. In *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

MORPHO's attorney states that MORPHO's business consists of the sale and maintenance of Automated Fingerprinting Identification Systems (the "system") to federal, state, and local governmental entities. MORPHO asserts that it is a leading provider of this type of system for civil purposes, such as tracking and identifying applicants for state and federal aid. The attorney explains that MORPHO was one of several competitors for a pilot project for the LSIS, and that "if the pilot project is successful and the funds are available, [the department] will then award the statewide LSIS contract to the company performing the pilot program." However, the department has not yet awarded the statewide LSIS contract. MORPHO asserts that release of the marked sentences would provide commercial information that would cause substantial harm to MORPHO's competitive position in regard to this LSIS contract. We agree that MORPHO has shown the applicability of the financial or commercial prong of section 552.110 to the marked information. This information is therefore protected from disclosure under section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID#111969

Enclosures: Marked documents

cc: Mr. Bruce Bowers
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(w/o enclosures)

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